UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

MONTY L. CLISSO,	)	
	)	
Plaintiff,	)	Case No. 2:03CV00027
	)	
v.	)	**OPINION**
	)	
GLOBAL INDUSTRIAL TECHNOLOGIES, INC. RETIREMENT INCOME PLAN,	)	By: James P. Jones
	)	United States District Judge
	)	
	)	
Defendant.	)	

Carl E. McAfee, McAfee Law Firm, P.C., Norton, Virginia, for Plaintiff; Benjamin A. Street, Street Law Firm, LLP, Grundy, Virginia, and John H. Wilson and William M. Hassan, Klett Rooney Lieber & Schorling, Pittsburgh, Pennsylvania, for Defendant.

The primary question in this ERISA case is whether a pension plan is entitled to repayment from a plan participant of an erroneous payment to him of $70,910.55, based on a mistaken calculation of his pension benefit. Based on the summary judgment record, I find that the plan participant has no defense to repayment and thus enter summary judgment for the plan.

The plaintiff, Monty L. Clisso, is a former employee of Global Industrial Technologies, Inc. ("Global"), which sponsors the Global Industrial Technologies, Inc. Retirement Income Plan ("the Plan"), the defendant in this case. Clisso filed the

present action against the Plan seeking a declaratory judgment and an injunction prohibiting the Plan from withholding his pension benefits.[1] The Plan counterclaimed, alleging that Clisso had been overpaid a lump sum pension benefit by mistake, and seeking judgment against Clisso for the overpayment, together with interest and attorneys' fees and costs. The Plan has now filed a motion for summary judgment, which has been briefed and is ripe for decision.[2]

Based on the summary judgment record, the facts of the case are as follows. Clisso first left his position at Global in 1990, at which time he received a lump sum distribution of his entire available benefit under the Plan, amounting to $29,000.95. The Plan claims that Clisso received an additional $293.27 the following year; Clisso does not recall receiving this second payment. Clisso returned to Global later in 1990, at which time he was informed that if he wished to reinstate his pension to its original value, he would have to repay $31,076.02 in a lump sum amount within five years of his rehire date. Clisso claims that it was his understanding that the

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[1] Although Clisso asserts subject matter jurisdiction based on diversity of citizenship, it is not apparent that the amount in controversy satisfies the jurisdictional minimum. However, subject matter jurisdiction does exist under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. § 1132(a)(1)(B) (West 1999), which empowers an ERISA plan participant to bring a civil action to "enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

[2] Neither party has requested oral argument. The facts and legal contentions are adequately presented in the materials before the court and argument would not significantly aid the decisional process.

repayment was to be deducted from either his salary or bonuses, but he "cannot state" whether any deductions were actually made. (Clisso Aff. ¶ 5.) The Plan claims that Clisso never made the repayment required to reinstate his pension to its original value.

In 1994, Clisso went on long-term disability, and in January of 2002, he received a calculation of his available benefits under the Plan. That calculation mistakenly failed to account for the lump sum distribution Clisso had received after first leaving Global in 1990. Thus, in January 2002, the Plan incorrectly informed Clisso that he was eligible to receive a lump sum benefit payment of $100,173.16, plus a monthly benefit of $1,287.56 until he reached age sixty-five. The correct lump sum benefit was $29,262.61, which is $70,910.55 less than what the Plan had erroneously calculated. The Plan paid Clisso the incorrect lump sum benefit in April 2002, in addition to his monthly benefits for February, March, April, May, and June of 2002. On June 17, 2002, the Plan discovered its mistake and notified Clisso in a letter dated June 25, 2002, that he was to return the overpayment. Beginning July 1, 2002, because Clisso had failed to return the overpayment, the Plan began withholding Clisso's monthly benefit payments to recoup part of the erroneous payment. However, because of the limited payment period of Clisso's pension

benefits, such withholding will not enable the Plan to fully recover the overpayment. (Freeman Aff. ¶ 26.)

Summary judgment is appropriate only if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). All reasonable inferences are "viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). Although the moving party must provide more than a conclusory statement that there are no genuine issues of material fact to support a motion for summary judgment, it "'need not produce evidence, but simply can argue that there is an absence of evidence by which the nonmovant can prove his case.'" *Cray Communications, Inc. v. Novatel Computer Sys., Inc.,* 33 F.3d 390, 393-94 (4th Cir. 1994) (quoting 10A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2720, at 10 (2d ed. Supp. 1994)); *see also Celotex,* 477 U.S. at 325 ("[T]he burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.").

Once the moving party has met its burden, "the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Matsushita,* 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The nonmoving party's

evidence must be probative, not merely colorable, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986), cannot be "conclusory statements, without specific evidentiary support," *Causey v. Balog*, 162 F.3d 795, 801-02 (4th Cir. 1998), cannot be hearsay, *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996), and must "contain admissible evidence and be based on personal knowledge." *Id.*

Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis." *Id.* at 327. It is the "affirmative obligation of the trial judge to prevent factually unsupported claims and defenses from proceeding to trial." *Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993) (internal quotation marks omitted).

I will grant the Plan's motion for summary judgment because Clisso has failed to present evidence of specific facts showing that there is a genuine issue for trial. Clisso admits that he received a lump sum distribution of $29,000.95 in 1991. (Pl.'s Answers to Def.'s First Set of Req. for Admis. ¶ 1.) Clisso also admits that he knew that he would have to repay that lump sum distribution in order to reinstate his pension to its original value. (Clisso Aff. ¶ 5.) Clisso further admits that he "cannot state" whether he ever did make that repayment. (*Id*.) The Plan's letter to Clisso, dated June 25, 2002, explains that the 2002 lump sum payment was incorrectly

calculated in that it mistakenly failed to account for the prior lump sum distribution, but Clisso fails to present any evidence disputing that the 2002 lump sum payment was made in error. Finally, section 9.11 of the Plan document provides that plan participants must "promptly . . . return any payment made by mistake of fact or law or any other error, unless recovered by adjustment in the monthly payments." (Freeman Aff. Ex. G.)

The Fourth Circuit has required a participant to refund an overpayment made by an ERISA plan under the theory of unjust enrichment. *See Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985 (4th Cir. 1990). In *Waller*, the plan administrator advanced a participant a payment pursuant to a provision in the plan permitting the advancement of payments for medical expenses under certain conditions if the participant signed an agreement to repay the payment in full, but the administrator failed to execute the requisite agreement with the participant. 906 F.2d at 986. The court fashioned a federal common law rule of unjust enrichment for the case because: (1) the plan provided for repayment of advanced monies; (2) ERISA allows for the return of mistakenly paid contributions made by employers to plan funds; and (3) the facts of the case fit the typical unjust enrichment scenario. *Id*. at 993-94.

Reimbursement on the basis of unjust enrichment is also appropriate in this case. First, section 9.11 of the Plan document provides that any overpayment be promptly returned, unless it is recouped from the monthly payments. Second, although ERISA does not specifically address the reimbursement of mistaken payments by employers to participants as it does with mistaken payments by employers to plan funds, the same principles apply in this case as in *Waller*, where the court recognized that "reaching a contrary result would 'discourage some employers from operating ERISA qualifying plans. It thus furthers the purposes of ERISA to recognize this cause of action.'" *Id*. at 993 (citation omitted). Similarly, prohibiting reimbursement of the Plan in this case would discourage it from operating an ERISA plan. Third, the facts of this case are appropriate to an unjust enrichment claim because the Plan reasonably expected to be reimbursed for its mistaken payment; Clisso admits that he was aware of the possibility that he did not repay his first lump sum distribution; and the interests of society would be served by the imposition of an equitable remedy. *See id*. at 993-94 (listing and applying the three elements of unjust enrichment to Waller's case).

Based on the summary judgment record, I find that no reasonable trier of fact would find that Clisso had made the requisite repayment to reinstate his pension to its original value, or that the lump sum payment was anything other than a

miscalculation. I will therefore grant the Plan's motion for summary judgment, and enter judgment in its favor for the current amount of the overpayment.[3] I will not award the Plan pre-judgment interest because Clisso was not responsible for the accounting error that resulted in the erroneous lump sum payment, and a lengthy period has not elapsed since the date the Plan discovered its mistake. *See Quesinberry v. Life Ins. Co. of N. America*, 987 F.2d 1017, 1030 (4th Cir. 1993) (recognizing the rule that the award of pre-judgment interest in ERISA cases is discretionary). Of course, the Plan will be entitled to the post-judgment interest granted by statute to any judgment creditor. *See* 28 U.S.C.A. § 1961(a) (West 2003).

The Plan also seeks its attorneys' fees in this action. An award under ERISA for reasonable attorneys' fees and costs is within the discretion of the court. *Quesinberry*, 987 F.2d at 1028 (construing 29 U.S.C.A. § 1132(g)). The Fourth Circuit has provided district courts with the following five factors to aid them in their decision: (1) the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing party would deter other persons acting under similar circumstances; (4) whether the party requesting attorneys' fees sought to

[3] The current amount due as of September 19, 2003, was $67,849.46, after recoupment through the withholding of monthly benefits since July 1, 2002. (Freeman Aff. ¶ 28.) The judgment will be subject to credit for any further amounts withheld by the Plan.

benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. *Quesinberry*, 987 F.2d at 1029. These factors are not to be rigidly applied, but are meant to provide the district court with "general guidelines" in determining whether to grant attorneys' fees. *Id*. If the Plan wishes to seek attorneys' fees in the present case, it may file a motion pursuant to Federal Rule of Civil Procedure 54(d)(2) within the time permitted by that rule.

A separate judgment consistent with this opinion is being entered herewith.

DATED: November 20, 2003

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United States District Judge